

**BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA**

In the Matter of:

ALLEN K. SETTLE,

Respondent.

**Case No. 99/804
OAH No. L2005030449**

PROPOSED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings, on September 19 and 20, 2005, in San Luis Obispo, California.

Melodee A. Mathay, Senior Commission Counsel, represented complainant.

Allen K. Settle (respondent) appeared personally and represented himself.

Oral and documentary evidence was received and the matter was submitted for decision. On October 21, 2005, the Administrative Law Judge reopened the record and issued an Order directing complainant's counsel to submit copies of all sections of the California Code of Regulations that were in effect during the relevant time period, and that had been cited by complainant during the hearing, and in the Accusation and Amended Accusation. Complainant submitted the requested sections of California Code of Regulations on October 21, 2005. They were marked collectively as exhibit 28 for identification. Official Notice was taken of the submitted regulations. The matter was deemed submitted on October 21, 2005.

PROCEDURAL HISTORY

On January 30, 2004, Melody Mathay, Senior Commission Counsel, issued a "Report in Support of Finding of Probable Cause" on behalf of Steven Benito Russo, Chief of Enforcement, Fair Political Practices Commission. Respondent Settle submitted an "Opposition to Report in Support of Probable Cause" on April 21, 2004. A "Probable Cause Conference" was held on April 29, 2004.

On July 21, 2004, Mark Krausse, Executive Director of the Fair Political Practices Commission, issued an "Order Finding Probable Cause" pursuant to California Code of Regulations, title 2, section 18361, subdivision (d)(4). In issuing the above referenced Order, Mr. Krausse determined that there was sufficient evidence to believe that respondent had violated the conflict of interest provision of Government Code section 87100 in that respondent made or participated in three separate governmental decisions in which he knew or had reason to know that he had a financial interest.

On September 24, 2004, Mark Krausse (complainant) made and filed the Accusation in his official capacity as Executive Director, Fair Political Practices Commission, State of California. Respondent filed a timely Notice of Defense.

At the conclusion of the hearing, Ms. Mathay, in her capacity as counsel for complainant, submitted an Amended Accusation according to proof. Said Amended Accusation was admitted and made part of the jurisdictional documents in exhibit 1.

FACTUAL FINDINGS

1. Respondent is currently a member of the City Council for the City of San Luis Obispo, California. Respondent served as mayor from 1994 through 2002.
2. At all times relevant to the Accusation, respondent was a "public official" as defined in Government Code section 82048, and is therefore subject to the conflict of interest restrictions of the Political Reform Act.¹
3. In April 1998, SC Properties, LLC, an entity that managed certain aspects of San Luis Obispo Marketplace, LLC, submitted an application to the City's Community Development Department to annex and pre-zone the entire parcel known as the "Dalidio Property" into the San Luis Obispo city limits. The Dalidio Property, owned by various trusts for Dalidio family members, is a 131-acre agricultural parcel located in the County of San Luis Obispo, just outside the boundaries of the City, abutting Highway 101. The assessor's parcel number (APN) of the Dalidio Property is APN 067-121-022
4. The application for annexation of the Dalidio Property included a development plan and a site plan. The application also included a development project consisting of a 40-acre retail commercial center known as the San Luis Obispo Marketplace, 11.1 acres of medium/high density residential use, 55 acres of open space, 5 acres for a park extension, 9.2 acres of interim open space, and 10.7 acres of road and freeway access. This development project was commonly known as the San Luis Obispo Marketplace Project (Marketplace Project) and is located directly south of a financially troubled commercial area known as the "Central Coast Mall."

¹ The Political Reform Act is codified in Government Code sections 81000 through 91014. All statutory references are to the Government Code unless otherwise indicated.

5. The Marketplace Project was huge by any standard. In fact, it was the largest development project in the history of San Luis Obispo. The retail commercial portion of the Marketplace Project planned for a Target Department Store (116,200 square feet), a large home improvement store such as or similar to Home Depot (129,802 square feet), several mid-size retail buildings consisting to 10,000 to 75,000 square feet, and a number of small detached buildings for restaurants and retail shops consisting of 2,400 to 7,200 square feet. The development plan proposed the construction of buildings totaling approximately 514,642 square feet.

6. The area of the site plan that was designated residential, called for the building of a minimum of 180 housing units for a senior citizen or retirement community.

7. As part of the Marketplace Project, construction of a new freeway interchange on Highway 101 was to be built, connecting Prado Road on the east side of Highway 101 with Madonna Road on the west side of Highway 101 (Prado Freeway Interchange). The project opening was linked to the interchange opening (see exhibit "F").

8. The application for development of the Dalidio Property came before the City Council on July 21, 1998. During this meeting, the City Administrative Officer (CAO) gave an overview of the project, the Development review Manager described the physical design and potential retail uses of the proposed development, the Public Works Director discussed the Prado Road Interchange component of the proposal, and the Finance Director discussed the financing for the interchange. The minutes of this meeting (exhibit 12) indicate that the City Council voted to "adopt the CAO recommendation to conceptually approve the development. . ." However, the July 21, 1998 Council Agenda Report submitted by the CAO indicated that the City Council had previously decided not to "conceptually consider" general plan amendments or projects prior to application processing. Rather, the City Council instituted a process whereby it would "preview" complex projects and give direction to city staff. The purpose of the July 21, 1998 "preview" was to give the city council the "big picture" of the project including positive and negative ramifications before proceeding with such a major undertaking.

9. At the July 21, 1998 City Council meeting, the CAO in his report recommended that the City Council direct city personnel to negotiate a Memorandum of Understanding (MOU) between the City and the project developers.² The CAO in his report stressed that the City Council should be "committed to proceeding" before directing City personnel to negotiate an MOU. This commitment to proceed was important because of the considerable investment of City resources to process such a large and complex project. The report stated, "In the City's case, significant staff resources will be committed over the next two years by virtually every department in the City in processing this application."

² An MOU precedes the formal development agreement and sets forth negotiated financial commitments of the City and the project developers.

10. On February 2, 1999, the applicant paid \$145,031 to the City as fees for preparation of an Environmental Impact Report.

11. On April 20, 1999, respondent, in his then capacity as mayor of the City of San Luis Obispo, made and participated in making a governmental decision by the San Luis Obispo City Council, authorizing the negotiation of an MOU between the City and the applicant for development of the Dalidio Property. The vote to authorize negotiation of the MOU was three-to-two.

12. The MOU would set forth the details of the tax revenue sharing plan for construction of the Prado Interchange, the amount of funds advanced by the City and the developer for the interchange construction, financing assistance through the issuance of Mello-Roos District Bonds, and the payment of other significant fees associated with the project. Without a negotiated MOU in place, neither the City nor the developer would go forward with the project because of the substantial cost, time and resources necessary to continue with such a large project.

13. Although authorizing the negotiation of an MOU would not necessarily result in project approval, it represented a serious commitment on the part of the City Council to proceed with the project. The minutes of the April 20, 1999 City Council meeting show that two council members expressed support for the project, and respondent expressed support for the General Plan which provided for commercial development on the Dalidio Property. The CAO, in his Council Agenda Report, recommended that the City Council reaffirm its commitment to the General Plan concept of allowing some commercial and residential development on the Dalidio Property before directing City staff to negotiate an MOU. In addition to directing City staff to negotiate an MOU, a majority of the Council, including respondent, voted to affirm the General Plan concept of allowing commercial and residential development on the Dalidio Property.

14. In May 1999, SC Properties, LLC, submitted a revised draft development plan. This revised draft for the retail commercial portion of the Marketplace Project planned for a Target Department Store, a large home improvement store, a potential 160 room hotel, several mid-size retail buildings, and a number for small detached buildings for restaurants and retail shops. The revised development plan proposed the construction of buildings totaling approximately 510,000 square feet of gross leasing area.

15. On September 21, 1999, respondent, in his capacity as mayor of the City of San Luis Obispo, made and participated in making a governmental decision by the San Luis Obispo City Council, approving the MOU between the City and the applicant/developer for the Marketplace Project that was proposed for the Dalidio Property. The vote for approval of the MOU was three-to-two, with respondent voting in the affirmative.

16. The MOU set forth the details of the tax revenue sharing plan for construction of the Prado Road Interchange, including the percentage of net tax sales revenues that were to be distributed to the developers as reimbursement for their expected costs in building the interchange. The MOU also set forth the amount of funds that were to be advanced by the City and the developer for the interchange construction, financing assistance through the issuance of Mello-Roos District Bonds, and the payment of other significant fees associated with the project.

17. On September 21, 1999, respondent, in his capacity as mayor of the City of San Luis Obispo, made and participated in making a governmental decision by the San Luis Obispo City Council, to adopt a resolution of intention to issue Mello-Roos District Bonds in order to finance the construction of the Prado Road freeway interchange as part of the application of the Marketplace Project to annex and develop the Dalidio Property.

18. At the time that respondent voted on issues regarding the negotiation and subsequent approval of the MOU, and regarding the City's intention to issue Mello-Roos District Bonds, respondent owned real property located at 1610 Oceanaire Drive, San Luis Obispo (respondent's property). Respondent's property (APN 004-631-001) was adjacent to and within 300 feet of the Dalidio Property. Specifically, respondent's property was adjacent to what was described as the Laguna Park Extension and was within 300 feet of the area of the property proposed for residential use.

19. In 1999, the value of respondent's property was greater than \$1,000.00. Respondent reported his interest in this real property in his 1999 Annual Statement of Economic Interest by disclosing only the APN rather than the common address of the property. Respondent does not reside on the property but rather rents the property.

20. The development plan of the Dalidio Property had a material financial effect on respondent's property. This finding is based on the size of the proposed Marketplace Project, the proposed annexation of the Dalidio Property to the City, the extent of the proposed commercial and residential development of the property, the construction of the proposed Prado Road Interchange, improved traffic patterns in the area, the construction of landscaped park areas, and the fact that respondent's property was adjacent to and within 300 feet of the proposed Marketplace Project. Complainant's expert, a licensed real estate appraiser with 20 years experience who specializes in appraising residential properties, opined that the Marketplace Project would increase the value of respondent's property based on the factors cited above. Respondent knew or had reason to know that the Marketplace Project would have had a material and financial affect on his Oceanaire Drive property.

21. At some point during the fall of 1999, the general public became aware that respondent owned the Oceanaire Drive property. Thereafter, respondent sought advice from the Fair Political Practices Commission as to whether he should continue to vote on issues relating to the Marketplace Project based on an expected revised development plan

22. In late 1999, the applicant for the Marketplace project indicated that it would submit a revised development plan wherein the Dalidio Property would be annexed and built in stages. The first stage would only include the proposed commercial zone of the project. Based on the revised plan, the distance from respondent's property to the commercial zone (stage 1) of the project would be 768 feet. The revised plan was submitted on January 6, 2000.

RELEVANT STATUTES AND REGULATIONS

23. The conflict of interest provisions of the Political Reform Act are set forth in Government Code section 81001 et. seq. The Fair Political Practices Commission adopted regulations regarding conflict of interests for public officials in California Code of Regulations, Title 2, section 18109 et. seq. Some of the relevant statutes and regulations haven been revised since the time period set forth in the Accusation and the Amended Accusation. The Administrative Law Judge will apply the statutes and regulations in effect at the time of the incidents set forth in the Accusation and Amended Accusation.

24. Section 81002, subdivision (c), requires a public official to disclose assets and income that may be materially affected by their official actions, and in some circumstances, the officials should be disqualified from acting to avoid that conflict of interest.

25. Section 81001, subdivision (b) states that "public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of the people who have supported them." In order to accomplish this purpose, section 87100 prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence any governmental decision in which the knows or has reason to know that he or she has a financial interest.

26. Section 87103, in effect during the relevant time period, provided that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material effect, distinguishable from its effect on the public generally, on any real property in which the public official has a direct or indirect interest worth \$1,000 or more."

27. An effect of a decision on real property is considered "reasonably foreseeable" if there is a substantial likelihood that it will effect property values, positively or negatively, or will alter or change the use of the property in some manner. (*Downey Cares v. Downey Community Development* (1987) 196 Cal.App.3d 983; *Witt v. Morrow* (1977) 70 Cal.App.3d 81; *In re Thorner* (1975) 1 FPPC Ops. 198).

28. Section 82033, in effect during the relevant time period, defined an interest in real property as “any leasehold, beneficial or ownership interest, or an option to acquire such an interest, in real property located in the jurisdiction, owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, if the fair market value of the is \$1,000 or more.

29. Pursuant to section 82035, real property is deemed to be within the jurisdiction of the local government agency if the property, or any part of the property, is located within or not more than two miles outside the boundaries of the jurisdiction, or within two miles of any land owned or used by the local government agency.

30. California Code of Regulations, title 2, section 18702.2, in effect during the relevant time period set forth in the Accusation and Amended Accusation, provided that a public official “makes a governmental decision” when, acting within the authority of his or her position, the official (1) votes on a matter; (2) appoints a person; (3) obligates or commits his or her agency to a course of action; (4) enters into any contractual agreement on behalf of his or her agency; or (5) determines not to act within the meaning of the four foregoing criteria, unless such determination is made because of his or her financial interest.

31. California Code of Regulations, title 2, section 18702.2, in effect during the relevant time period, provided that a public official participates in making a governmental decision when, acting within the authority of his or her position, the official advises or makes recommendations to the decision-maker either directly or without significant intervening substantive review, by preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official, and the purpose of which is to influence a governmental decision.

32. Different conflict of interest provisions apply if the public official’s economic interest is “directly” or “indirectly” involved in a governmental decision. Regulation 18704.2, subdivision (a), in effect during the relevant time period, set forth criteria to determine when a public official’s interest in real property is “directly involved” in a governmental decision before the public agency. Regulation 18704.2, subdivision (b), provided that the materiality standards of Regulation 18705.2, subdivisions (b) or (c), must be applied if a public official’s economic interest is indirectly involved in a governmental decision.

35. Under regulation 18705.2, subdivision (b)(1)(A), in effect during the relevant time period, the effect of a decision is material as to “indirectly involved” real property in which the official has an ownership interest, if the real property, or any part of the real property is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect on the upon the official’s real property interest.

36. Regulation 18707.1 provides for a general public exception to the financial effect rule if the reasonably foreseeable financial effect of the governmental decision on an official's economic interest is indistinguishable from the effect on the public generally. This regulation applies when the decision will affect a significant segment of the public in substantially the same manner as it affects the public official's economic interest.

DISCUSSION

36. When respondent cast his votes on the MOU and on the resolution of intent to issue Mello-Roos District Bonds, he owned real property that was adjacent to and within 300 feet of the proposed Marketplace Project. Therefore, respondent's real property was "indirectly involved" in these governmental decisions pursuant to regulation 18705.2, subdivision (b)(1)(A). Based on this fact and on the factors set forth in Finding 20, it was reasonably foreseeable that respondent's decisions would have a material financial effect on his real property pursuant to Government Code section 87103.

37. Respondent did not establish that the effect of his decision on his financial interest is indistinguishable from the effect on the interest of the public generally, pursuant to Regulation 18707.1.

38. Respondent contends that the materiality standard set forth in section 18705.2, subdivision (b)(1)(A), does not apply because his property is actually 768 feet from the boundaries of the Marketplace Project. Respondent's contention is not persuasive because it is based on a subsequent revised project application by the developer after respondent voted on issues relating to the negotiation and approval of the MOU and the Mello-Roos funding.

39. Respondent contends that it was not reasonably foreseeable that his votes on the MOU and Mello-Roos issue would have a material financial effect on his real property. Respondent based his contention on the fact that the MOU and Mello-Roos District Bonds were non-binding preliminary matters in the application process. Respondent's contention is not persuasive based on the following:

- (1) The MOU was an important step in the process for the project because it would have set the parameters for the eventual development agreement, including the crucial element regarding financing of the Prado Freeway Interchange;
- (2) The resolution of intention to issue Mello-Roos District Bonds was an important step because it set in motion the financing mechanism for the interchange;
- (3) The CAO reports that were submitted to the City Council prior to each vote on the above issues, stressed the importance of the each vote to the development process. Without a negotiated MOU, neither the City nor the developer would agree to go forward with such a project. Without an approved MOU, the project would not

proceed. Without a formal resolution by the City Council of its intention to issue Mello-Roos District Bonds to help finance the Prado Road Interchange, the project would not go forward;

(4) Although the City Council's decisions regarding the MOU and the Mello-Roos Resolution were non-binding, they were important essential steps in the application process. Further, the fact that these votes were early in the process does not diminish their importance to the development project.

40. Based on the facts of this case and the applicable statutes and regulations referenced above, respondent violated the conflict of interest provisions of the Act as well as the regulations adopted by the Commission by: (1) voting to authorize city personnel to negotiate an MOU; (2) voting to approve the MOU for the Marketplace Project; and (3) voting affirmatively on a resolution of intent to issue Mello-Roos District Bonds for the construction of the Prado Road Interchange.

41. Respondent asserted at the hearing that his main concern was to go forward with the general plan and that he gave very little thought to the underlying development project. Respondent's assertion is not persuasive. Respondent is extremely knowledgeable of the affairs of city government based on his education and on his 11 years experience on the San Luis City Council. Further, there had been previous attempts to annex and to develop the Dalidio Property for more than a decade. As noted above, this project was the largest proposed development project in the City's history. Based on the evidence, a reasonable inference can be drawn that respondent knew of the material financial effect on his Oceanaire Drive property. At the very least, he should have known.

42. Respondent sought to obtain advice from the Commission only after the public became aware of respondent's interest in the Oceanaire Drive real property.

43. There was no evidence presented establishing that respondent has previously violated the Political Reform Act.

LEGAL CONCLUSIONS

1. Cause exists to order respondent to pay a penalty pursuant to Government Code section 83116, subdivision (c), for making and participating in a governmental decision by the San Luis Obispo City Council to authorize the negotiation of a Memorandum of Understanding regarding the application of SC Properties, LLC, to annex and develop the Dalidio Property. Respondent knew or had reason to know that he had a financial interest in the decision to authorize the MOU, and his vote thereon was a violation of Government Code section 87100.

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2. Cause exists to order respondent to pay a penalty pursuant to Government Code section 83116, subdivision (c), for making and participating in a governmental decision by the San Luis Obispo City Council to approve the Memorandum of Understanding between the City of San Luis Obispo and San Luis Obispo Marketplace Associates, LLC, regarding the annexation and development of the Dalidio Property. Respondent knew or had reason to know that he had a financial interest in the decision to approve the MOU, and his vote thereon was a violation of Government Code section 87100.

3. Cause exists to order respondent to pay a penalty pursuant to Government Code section 83116, subdivision (c), for making and participating in a governmental decision by the San Luis Obispo City Council to adopt a resolution of intention to issue Mello-Roos District Bonds in order to finance the construction of a freeway interchange as part of the San Luis Obispo Marketplace Associates, LLC, development project of the Dalidio Property. Respondent knew or had reason to know that he had a financial interest in the decision to adopt the resolution of intention to issue Mello-Roos District Bonds, and his vote thereon was a violation of Government Code section 87100.


ORDER

1. Respondent Allen K. Settle is ordered to pay a monetary penalty in the amount of \$2,000 pursuant to Government Code section 83116, based on Legal Conclusion No. 1.

2. Respondent Allen K. Settle is ordered to pay a monetary penalty in the amount of \$2,000 pursuant to Government Code section 83116, based on Legal Conclusion No. 2.

3. Respondent Allen K. Settle is ordered to pay a monetary penalty in the amount of \$2,000 pursuant to Government Code section 83116, based on Legal Conclusion No. 3.

DATED: October 28, 2005


HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings